

THE LEGAL ADVISER

DEPARTMENT OF STATE

WASHINGTON

December 5, 2011

The Honorable Tony West  
Assistant Attorney General  
Civil Division  
Department of Justice  
950 Pennsylvania Ave. N.W.  
Washington, DC 20530

Re: *The Abi Jaoudi and Azar Trading Corp. v. CIGNA Worldwide Insurance Co.*,  
Civil Action No. 91-6785 (E.D. Pa.)

Dear Assistant Attorney General West:

I write to request that the Department of Justice convey to the U.S. District Court for the Eastern District of Pennsylvania in the above-referenced case the determination of the Department of State that the Respondents Josie Senesie and Foday Sesay are entitled to immunity from suit to the extent the District Court finds that, under Liberian law, they acted in their official capacities as Liberia's Commissioner of Insurance by recognizing the Liberian judgment in Plaintiff's favor as a valid debt and by initiating and continuing the suit in the Cayman Islands. To the extent that the District Court finds that either or both of these acts were, under Liberian law, taken by Mr. Senesie and Mr. Sesay solely in their capacities as representatives of the estate and thus outside of their official capacities, however, they are not entitled to immunity from suit with respect to such acts. The Department has further determined that, to the extent that the claims against Respondent Samuel Lohman arise from his conduct on behalf of Mr. Senesie when he was acting as the court-appointed receiver, any immunity to which Mr. Lohman is entitled derives from and cannot exceed the immunity to which Mr. Senesie is entitled for such acts as were taken in his official capacity.

This action arises from litigation involving CIGNA Worldwide Insurance Co.'s (CWW) Liberian branch. In 1995, the U.S. District Court for the Eastern District of Pennsylvania (District Court) held that CWW was not liable for breach of insurance contracts in a suit brought by Abi Jaoudi and Azar Trading Corp. (AJA). That decision was affirmed on appeal. In 1998, AJA brought a similar suit in Liberia, winning a judgment for more than US\$66 million. The District Court entered an antisuit injunction in 2001 prohibiting AJA from enforcing the Liberian judgment. The Liberian court responded by issuing an injunction enjoining the enforcement of the District Court's anti-suit injunction. In 2007, a Liberian court appointed Liberia's then-Commissioner of Insurance, Respondent Senesie, as receiver of the estate of CWW's Liberian branch (the estate). Under Liberian law, only the Commissioner of Insurance may be appointed as a receiver to liquidate the business of an insurance company doing business in Liberia. *See*

§ 5.13 of the Insurance Law of Liberia (1973). The court authorized Mr. Senesie in that capacity, *inter alia*, “to initiate, prosecute and continue the prosecution of any and all legal or arbitral proceedings (either in the name of the Receiver or in the name of the Debtor), whether before courts or arbitral tribunals seated in Liberia or abroad, and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the property or the Receiver, and to settle or compromise any such proceedings.” Court’s Final Judgment Appointing Commissioner of Insurance as Receiver of and to Liquidate Cigna Worldwide Insurance Company’s Liberian Branch at ¶ 3(h) (Apr. 24, 2007), Exhibit 3 to Affidavit by Josie Senesie (Oct. 10, 2010) [hereinafter Liberian Court Order]. The Liberian Court Order also provides that “no proceeding or enforcement process in any court or tribunal . . . shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.” *Id.* at ¶ 7.

Mr. Senesie retained Respondent Lohman, a U.S. citizen who had previously represented AJA, as counsel. In July 2008, Mr. Senesie brought suit on behalf of the estate in the Cayman Islands seeking to enforce AJA’s Liberian judgment and another judgment in favor of 22 other creditors against ACE Ltd., a then-Cayman Islands company that had been assigned CWW’s Liberian assets and liabilities in 1999. In November 2008, CWW filed the present action seeking to hold Mr. Senesie and Mr. Lohman, among others, in contempt for aiding and abetting a violation of the 2001 antisuit injunction. Respondent Sesay succeeded Mr. Senesie as Insurance Commissioner, and thus as receiver of the estate, in November 2009. In recognizing that Mr. Sesay succeeded Mr. Senesie as receiver by virtue of his appointment to the office of Insurance Commissioner, the Liberian court declared that “given the statutory responsibility and powers of the Commissioner of Insurance as provided for pursuant to [Section] 5.13 of the Liberian Insurance Law, . . . the appointment of the Commissioner of Insurance as a Receiver of the Liberian branch of an alien insurer is an appointment of that Receiver in his or her capacity as Commissioner of Insurance.” Order at ¶ 2 (Feb. 16, 2010), Exhibit A to Suggestion to Substitute Name of Respondent (Sept. 22, 2010). Mr. Sesay has moved to substitute himself for Mr. Senesie in this action.

The Republic of Liberia, by diplomatic note dated August 17, 2010, requested a Statement of Interest suggesting immunity for the Respondents. Liberia renewed its request by diplomatic notes dated October 12, 2010, November 15, 2010, and August 8, 2011, and by note verbale on March 2, 2011.

As an initial matter, CWW and Respondents agree that Liberia is not the real party in interest. *See* Letter from Donald Francis Donovan to James A. Gresser et al. at 13 (Dec. 9, 2010) (“This is not a situation where a suit against an individual is in reality a suit against the state.”); Respondents’ Joint Brief in Opposition at 2 (Mar. 2, 2011) (“Respondents agree that Liberia is not the real party in interest . . .”). By note verbale dated March 2, 2011, the Republic of Liberia also confirmed “that it is not the real party in interest in the Proceedings.” In addition, CWW and Respondents agree that the action is presently proceeding against Mr. Sesay in his representative capacity as receiver for the estate and against Mr. Senesie in his personal capacity. *See* CWW’s Memorandum of

Law in Opposition to Respondents' Motion to Declare the Discovery Requests Moot at 5 n.1 (May 25, 2011) ("This action continues against the office of the receiver – now represented by Sesay – and against Senesie in his individual capacity."); CWW's Memorandum of Law in Support of Motion to Compel Discovery at 8 (Feb. 17, 2011) ("[N]o Respondent has been named in his capacity as an official of the Liberian government."); Non-Party Respondents Sesay and Senesie's Pro Se Memorandum of Law in Response to the Court's August 19, 2011 Order at 4 (Sept. 16, 2011) (agreeing that CWW "has commenced this action against Mr. Senesie in both his personal and representative capacities and does not oppose the substitution of Mr. Sesay for Mr. Senesie in his representative capacity"). Respondents Sesay and Senesie also take the position that they "have been involved in this matter solely in their official capacities as Commissioners of Insurance of the Republic of Liberia and Liberian court-appointed Receivers." *Id.* at 1-2. Similarly, by diplomatic note dated August 8, 2011, the Republic of Liberia acknowledged that Respondents have been sued "in their respective personal and representative capacities," and it also asserted "that at all times relevant to the Proceedings these Respondents were acting in their respective official capacities and fulfilling their official duties as Officers of the Government of Liberia, or in the case of Attorney Lohman, as legal counsel to Mr. Senesie and Mr. Sesay in their official capacities." Although the Department of State takes into account the views of a foreign state as to the immunity of its own officials, including whether a foreign state understood its officials to have acted in an official capacity, such an assertion is not dispositive.

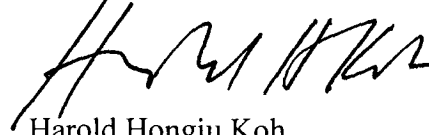
Both current and former officials of a foreign state generally enjoy immunity for acts undertaken in their official capacity. As Commissioners of Insurance at the time of the conduct that is the basis of the contempt motion, Respondents Senesie and Sesay were officials of the Republic of Liberia and thus are generally entitled to immunity while acting in that capacity. Although the character of an act under the law of the foreign state is not the only relevant factor in making immunity determinations, based upon the particular facts of this case, the Department of State has concluded that Respondents Senesie and Sesay would be immune from suit to the extent that the District Court finds that recognizing AJA's Liberian judgment against CWW and initiating and continuing the suit in the Cayman Islands were, under Liberian law, acts Mr. Senesie and Mr. Sesay took in their official capacities as Insurance Commissioner. To the extent the District Court finds that either or both of these acts were, under Liberian law, taken by Mr. Senesie and Mr. Sesay solely in their capacities as representatives of the estate and thus outside of their official capacities, however, the Department concludes that they would not be immune from suit with respect to such acts. The Department recognizes the possibility that Liberian law may treat acts taken in the Insurance Commissioner's capacity as representative of the estate as acts taken in his official capacity, in which event he would not be acting solely in his capacity as representative of the estate.

The conduct that is the basis of the contempt motion against Respondent Lohman includes actions that he took while representing AJA and actions that he took on behalf of Mr. Senesie when he was acting as the court-appointed receiver of CWW's Liberian branch. The Department of State has concluded that Mr. Lohman is not entitled to immunity for actions he took while representing AJA. The Department of State has

further concluded that, to the extent that the claims against Mr. Lohman arise from his conduct on behalf of Mr. Senesie, any immunity to which Mr. Lohman is entitled derives from and cannot exceed the immunity to which Mr. Senesie is entitled for such acts as were taken in his official capacity.

The Department of State requests that the Department of Justice submit to the District Court an appropriate filing setting forth this immunity determination.

Sincerely,

A handwritten signature in black ink, appearing to read 'H. Koh', written over a horizontal line.

Harold Hongju Koh  
Legal Adviser